

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

Orlando Scott Martin,

Petitioner

V.

Brian E. Williams, et al.,

Respondents

2:14-cv-01167-JAD-VCF

**Order Denying Motion for Stay,
Denying Motion for Appointment of
Counsel, Granting Motion to Strike,
and Denying Motion to Reconsider**

[ECF 18, 20, 22, 24]

Orlando Scott Martin brings this 28 USC § 2254 action challenging his Nevada state court convictions for assault with a deadly weapon and related charges.¹ I screened Martin’s petition, dismissed claim seven, and ordered respondents to respond to claims one through six.² Respondents timely answered Martin’s petition.³ Five months later, Martin filed a “Motion for Stay and Abey,”⁴ a second motion for appointment of counsel,⁵ and an amended petition.⁶ Martin also requests that I reconsider my October 15, 2014, screening order dismissing claim seven of his petition.⁷ Respondents move to strike Martin’s amended petition.⁸ I construe Martin’s “Motion for Stay and

1 ECF 7.

² See ECF 6.

³ ECFE 11

4 ECE 18

5 ECE 20

6 ECE 21

1 "Abey" as one for leave to amend,⁹ deny it, and grant respondents' motion to strike Martin's amended
2 petition. I also deny Martin's motion for appointment of counsel and motion to reconsider.

Discussion

4 | A. Motion for leave to amend and motion to strike [ECF 18, 22]

Motions for leave to amend a habeas petition are governed by the same standards as motions to amend a complaint in other civil actions. A party may amend a pleading once as a matter of course at any time before a responsive pleading is served.¹⁰ Once a responsive pleading has been served, a party may amend the pleading only by leave of court or by written consent of the adverse party.¹¹ Leave is freely given when justice so requires.¹² But a district court may deny leave to amend for “bad faith, undue delay, prejudice to the opposing party,” or where amendment would be futile.¹³ “Futility of amendment can, by itself, justify the denial of a motion for leave to amend.”¹⁴

Martin seeks to add three new claims in his amended petition: two due-process claims challenging the sufficiency of the evidence for his aiding-and-abetting and conspiracy conviction, and alleging that he proved self defense; and an equal-protection claim premised on an instructional error.¹⁵ Respondents argue that Martin’s amended petition should be stricken because Martin has failed to offer any explanation for his failure to include all of his claims in his original petition and because the proposed amendments would require litigation of a motion to dismiss after their answer has already been filed.¹⁶ Respondents also argue that the proposed amendments would be futile

²⁰ In his “Motion for Stay and Abey” Martin states that he will “re-draft and supplement or amend the pending petition,” to cure the deficiencies outlined in respondents’ answer. ECF 18 at 1.

¹⁰ FED. R. CIV. P. 15(a).

11 *Id.*

¹² *Morris v. U.S. Dist. Court*, 364 F.3d 891, 894 (9th Cir. 2004).

²⁵ ¹³ *Griggs v. Pace Am. Group*, 170 F.3d 877, 880 (9th Cir. 1999).

²⁶ ¹⁴ *United States v. Smithkline Beecham Clinical Labs.* 245 F.3d 1048, 1052 (9th Cir. 2001).

¹⁵ See ECF 21 at 4–7.

28 | ¹⁶ ECE 22 at 2

1 because Martin's new claims do not relate back to the filing of his original petition and are therefore
 2 barred by AEDPA's one-year limitations period.¹⁷ Martin offers no response.

3 **B. Martin's motion for leave to amend is denied, and his amended petition is stricken.**

4 An amended habeas petition only relates back if the amended claims are tied to the "same
 5 core of operative facts" alleged in the original petition.¹⁸ That claims relate to the same trial,
 6 conviction, or sentence is not enough.¹⁹ That a claim shares some facts in common with previous
 7 claims is also insufficient; the entire factual predicate of the amended claim must relate back to the
 8 original petition.²⁰

9 I agree with respondents that Martin's proposed amendments would be futile because his
 10 three new claims do not relate back to his original petition. For example, Martin's original petition
 11 does not allege any of the facts that Martin's amended petition alleges undermined the jury's verdict
 12 of guilty on the aiding and abetting and conspiracy counts. I also find that, even if one or part of
 13 these claims did relate back and amendment would not be entirely futile; Martin's motion for leave is
 14 also appropriately denied based on undue delay and prejudice to respondents. Martin has offered no
 15 explanation for his failure to include his new claims—and the facts supporting them, which he was
 16 well aware of—at the time he filed his original petition. I also find that respondents would be
 17 unfairly prejudiced if I granted Martin leave to amend at this belated date because respondents have
 18 already filed their answer, and Martin's amended complaint would force them to litigate a dismissal
 19 motion raising their timeliness arguments. I therefore deny Martin's motion for leave to amend,
 20 grant respondents' motion to strike, and strike Martin's amended petition.

21

22

23

24 ¹⁷ *Id.*

25 ¹⁸ *Mayle v. Felix*, 545 U.S. 644, 664 (2005).

26 ¹⁹ *Id.* at 662 (stating that if "claims asserted after the one-year period could be revived simply
 27 because they relate to the same trial, conviction, or sentence as a timely filed claim, AEDPA's
 limitation period would have slim significance.").

28 ²⁰ *Schneider v. McDaniel*, 674 F.3d 1144, 1151 (9th Cir. 2012).

1 **C. Motion for appointment of counsel [ECF 20]**

2 There is no constitutional right to counsel for a federal habeas corpus proceeding.²¹ But, the
 3 district court has discretion to appoint counsel if the “interests of justice require representation,” and
 4 the court must appoint counsel if the case is so complex that denial of counsel would amount to a
 5 denial of due process, or the petitioner has such limited education that he is incapable of fairly
 6 presenting his claims.²²

7 Martin again moves for appointment of counsel, conclusorily alleging that “the issues in this
 8 case are complex and that [he] is unable to adequately present the claims without the assistance of
 9 counsel.”²³ I find that Martin’s petition is sufficiently clear and that his claims are not so complex
 10 that denial of counsel would amount to a denial of due process. Notably, six of Martins seven claims
 11 survived screening. In light of these facts and Martin’s failure to articulate any facts showing that his
 12 claims are particularly complex or that he is incapable of continuing to represent himself, his second
 13 motion for appointment of counsel is denied.

14 I also deny Martin’s motion to reconsider my screening order both because it is
 15 untimely—filed almost one year after issuance of the order and seven months after respondents’
 16 answer—and because Martin has given me no reason to revisit my previous ruling dismissing his
 17 ineffective-assistance-of-appellate-counsel claim.

26 ²¹ *Penn. v. Finley*, 481 U.S. 551, 555 (1987).

27 ²² See *Chaney v. Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), cert. denied, 481 U.S. 1023 (1987).

28 ²³ ECF 20 at 2.

Conclusion

2 Accordingly, IT IS HEREBY ORDERED that petitioner's motion for stay and abey pending
3 2254 petition [ECF 18], motion for appointment of counsel [ECF 20], and motion to reconsider
4 [ECF 24] are DENIED.

5 IT IS FURTHER ORDERED that respondents' motion to strike [ECF 22] is GRANTED.

6 The Clerk of Court is instructed to STRIKE ECF 21 from the record in this case.

7 I will address the merits of petitioner's original petition in due course.

8

DATED March 24, 2016

Jennifer A. Dorsey
United States District Judge